CHILDREN & FAMILY LAW APPELLATE BULLETIN

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What's inside?

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GREETINGS FROM THE CHIEF COUNSEL

I am happy to take this chance to write a few words to the attorneys who provide appellate representation to indigent children and parents in child welfare appeals. CPCS appellate counsel in criminal cases have long borne the unpleasant reality that the zealous performance of their professional duty to indigent clients will occasionally incur a certain degree of judicial displeasure. Typically such displeasure takes the form of an unnecessarily acerbic comment or question from the bench at oral argument; less frequently, it may be reflected by an appellate court's unnecessarily curt rejection of an argument more deserving than the court's treatment of it would suggest.

Earlier this year, Children and Family Law appellate attorneys were introduced to this unattractive consequence of representing poor children and parents with energy and zeal. An Appeals Court panel saw fit to repeatedly chastise both the lawyer for a parent and the lawyer for the children in language which was regrettably intemperate and injudicious. Such judicial criticism of assigned counsel who enforce the law and the Constitution for poor people by representing their clients with the identical energy and skill they would apply on behalf of a private, paying client is simply wrong. I have communicated to the appropriate judicial officers the concern of the Committee for Public Counsel Services about this inappropriate criticism of attorneys whom we train and certify and pay (albeit at a scandalously inadequate hourly rate) to provide this essential public service.

Happily, I can say that such intemperance is a rarity. In general, our appellate courts use appropriately neutral and dispassionate language in their review of trial court decisions concerning allegations of child abuse or neglect. We do not anticipate that similar attacks upon counsel will be repeated. In any case, I want to inform every member of our CAFL appellate panel that we take great pride in the high quality of the appellate representation you provide in these difficult and often heartbreaking cases and, I want to assure you that we will stand with you one hundred percent as you carry out your generous and noble service to the poor of this Commonwealth.

-William J. Leahy

PAST APPELLATE BULLETINS NOW AVAILABLE ON THE CPCS WEBSITE

You can now access past CAFL Appellate Bulletins on the CPCS website, at <www.state.ma.us/cpcs/CAFL/appellateindex.htm >.

LOOKING FOR WORK?

We are currently looking for attorneys to take CAFL appeals. Please call Andy Cohen at (617) 988-8310 or e-mail him at < acohen@publiccounsel.net > to let him know (a) how many cases you would like assigned to you, and (b) any geographical limitations you might have in taking assignments *(i.e.*, you will take cases south of Boston from the Cape to southern Worcester County).

E-MAIL ADDRESSES

In an effort to contact you faster and, at the same time, reduce our costs, we are trying to contact CAFL appellate attorneys primarily using e-mail. If we do not already have your e-mail address (and if you have never heard from us by e-mail, we do not), please send a message from your current e-mail address to Margaret Winchester at <mwinchester@publiccounsel.net> and to Tamika Jones at <tjones@publiccounsel.net> for inclusion on our e-mail database. Please update us if you change your e-mail address.

APPELLATE NETWORKING MEETINGS

Many of you have asked when we will resume our appellate networking meetings. You need wait no longer! We will hold the following meetings:

(1) Boston: 2nd floor jury pool room, Edward W. Brooke Courthouse, 24 New Chardon Street, Boston, on November 19, 2002, from 3:30 p.m. to 5:00 p.m.

(2) Springfield: Lower level conference room, Hampden Juvenile Court, 80 State Street, Springfield, November 21, 2002 from 3:00 p.m. to 4:30 p.m.

(3) Marlborough: Jury room, Marlborough District Court, 45 Williams Street, Marlborough, on January 9, 2003 from 2:30 p.m. to 4:00 p.m.

(4) Boston: Edward W. Brooke Courthouse, 24 New Chardon Street, Boston (room to be determined), on February 6, 2003, from 3:30 p.m. to 5:00 p.m.

As usual, we will provide snacks and handouts of interest to panel members.

BRIEF COMMENTS

We see many briefs where the fact and procedural history sections take up the first twenty to thirty pages. Elimination of unnecessary information in the fact and procedural history sections lets you get to your argument much faster and keeps the Court's attention. Review your fact and procedural history sections to determine whether all of the information is really necessary. For example, the Appeals Court may not need to know about your appellant-parent's DSS involvement as a child, the dates the court investigator was appointed and filed a report, or about the parent's history of services if the appeal focuses exclusively on the trial court's choice of adoption plan.

Gil Lima, First Assistant Clerk of the Appeals Court, informs us that he sees, and often rejects, briefs that use incorrect fonts. Briefs, according to Mr. Lima, often contain fonts in footnotes that are different from the text font and/or too small. He blames this on the fact that attorneys often rely on word processing formats that default, regardless of the font used in the text, to Times New Roman 10-point font for footnotes. As you know, both text and footnotes should be Courier 12-point or a similar font (which does *not* include Times New Roman) as set forth in Mass. R. App. P. 20(a)(2); see also Reporter's Notes to Mass. R. App. P. 20(a) at section II(2).

In addition, many briefs fail to include the findings and/or the decision appealed from in an addendum, as required by Mass. R. App. 16(a)(6). Although Rule 16(b) provides that appellees' briefs need not include the findings, we believe that it is good practice to include them. This allows the judge or clerk to read an appellee's brief and reference the findings without the need to have the appellant's brief at hand. All briefs, regardless of a party's appellant or appellee status, must include copies of statutes, rules and regulations referenced in the brief in an addendum pursuant to Rule 16(f).

STAY PENDING APPEAL

In Adoption of Duval, the Appeals Court refused to overturn a single justice's denial of a motion for stay of a termination decree pending appeal, noting that "petitioners have failed to identify 'meritorious issues in the usual sense of that phrase in appellate practice.'" 46 Mass. App. Ct. 916, 917 (1999) (citing Jones v. Manns, 33 Mass. App. Ct. 485, 492-493 & n.9 (1992)). Some question remained as to whether the Court in Duval intended to require that all petitioners for a stay show merit in the underlying appeal. Any lingering doubt was dispelled by the Supreme Judicial Court in Adoption of Don, 435 Mass. 158 (2001). As the Court held in Don, "we do not disturb the orders of the

(Stay Pending Appeal - continued from page 2)
single justice of the Appeals Court denying the parents' respective motions for a stay in this case, as the parents had not presented 'meritorious issues in the usual sense of that phrase in appellate practice.'" Id. at 170 (citing Duval, 46 Mass. App. Ct. at 917) (footnote and further citations omitted).

Motions for stay filed with the Appeals Court (either directly or after denial by the trial court) are heard by the single justice of the month, and not necessarily by the child welfare appeal "screening justices," Justices Perretta, Kantrowitz and Duffley. Justice Perretta explained at the March 2002 training for new CAFL appellate attorneys that, when she is faced with a stay motion, she will ordinarily deny the motion without prejudice. However, she conditions this denial on DSS giving appropriate notice to the movant of any intent to go forward with the adoption. This appears to protect sufficiently the interests of a parent or child appealing a termination decree from an adoption pending appeal. Justice Perretta suggested, however, that if DSS gives notice of intent to proceed with the adoption and the movant re-files the motion, she would require the movant to show merit as set forth in Don and Duval.

Justice Perretta's standard procedure also protects, to some degree, the need for an appellate attorney to argue "meritorious issues" to obtain a stay immediately upon assignment of the case. In the event transcripts are not available at the time DSS' notice of intent is served, counsel should ask the Appeals Court to issue a stay only until a date certain after transcripts are ready. This "temporary stay" will enable counsel to review the transcripts and make the necessary showing of merit under Don and Duval. In making such a request, counsel should offer to file monthly status reports with the Appeals Court with respect to progress on obtaining the transcripts.

Efforts are being made to make Justice Perretta's procedure standard among all Appeals Court justices.

WITHDRAWING AN APPEAL

Several attorneys have inquired about the proper way to withdraw an appeal. If the appeal has not yet been docketed in the Appeals Court, counsel need only file a motion in the trial court to dismiss the appeal. If the appeal has been docketed, however, the process is more complicated. A motion to withdraw an appeal filed in the Appeals Court must be accompanied by an affidavit of the appellant (not his or her attorney) stating (1) he or she understands that the dismissal is with prejudice, meaning that the appeal cannot be re-opened or re-filed, (2) the reason for the dismissal (such as settlement, a desire to pursue trial level remedies instead, or a desire to let the matter rest), (3) that his or her attorney explained the effect of the dismissal, and (4) he or she is satisfied with the advice of the attorney. Presumably, a child appellant seeking to withdraw an appeal would file a similar affidavit, although the attorney may wish to supplement such an affidavit with his or her own stating that the attorney agrees with this course of conduct and the child has made an adequately considered decision. An attorney who questions the child's ability to make this decision may substitute judgment or seek the appointment of a guardian ad litem for the child. See Standard 1.6 ("Determining and Advocating the Child Client's Position") of the Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases (available on the CPCS/CAFL website and the Assigned Counsel Manual). Attorneys should notify Co-Director Susan Dillard or Staff Attorney Andy Cohen in writing (e-mail is sufficient) when an appeal is dismissed so that we can update our records.

SJC STYLE MANUAL

In 1999, the Office of the Reporter of Decisions of the SJC (the "Reporter") issued and made available a style manual to provide guidelines for preparing appellate briefs. The manual sets forth rules of the SJC for writing style, abbreviations and case citations, and provides other practical information. Although the Reporter no longer has copies of the style manual, they are available for copying at the Social Law Library. Or, if you prefer, Staff Attorney Andy Cohen can e-mail you a copy of the manual (NB: the Reporter has eagerly given approval for such e-mail distribution). Andy's e-mail address for requests is: <acohen@publiccounsel.net>.

APPELLATE ORGANIZATIONS

As many of you are aware, support and networking organizations for appellate attorneys are few and far between. You might wish to check out the American Bar Association Council of Appellate Lawyers, a national appellate bench-bar organization. The organization is "devoted to the professional development of lawyers who practice appellate law and the fostering of creative dialogue between those lawyers and appellate judges, both federal and state, with the purpose of improving appellate practice." Justice Greaney of the SJC helped establish the Council. For more information, visit the Council's web site at < www.abanet.org/jd/ajc/calweb.html >

CLERICAL ERRORS IN DOCKET ENTRIES

Clerical errors in docketing (such as mis-dating or backdating entry of judgments) should not deprive parties of their appellate rights. In G.D. Matthews & Sons Corp. v. MSN Corp., 54 Mass. App. Ct. 18, 24-26 (2002), the defendant filed a notice of appeal of an order disqualifying its counsel due to a conflict. The left hand column of the Superior Court docket sheet recorded the date of the order as "06/21/2001." However, the notation itself read "order . . . Notice sent 6/20/01 (entered 6/20/01)." If the order was entered on June 20, the notice of appeal would have been late by one day. The Appeals Court held that the appeal was timely, because the ambiguity of the dates on the docket sheet was not the fault of either party but of the clerk. The Court applied the "evolving rule that a procedural tangle having its origin in a failure by the court . . . to observe the mandates of rules will generally be resolved in favor of preserving rights of appeal where this result is technically possible and does not work unfair prejudice to other parties." Id. at 25 (quoting Standard Register Co. v. Bolton-Emerson, Inc., 35 Mass. App. Ct. 570, 574 (1993)) (other citations omitted). It remains to be seen, however, whether the interest of the child in the permanency and speedy resolution of court proceedings constitutes "unfair prejudice" to the child sufficient to apply a different standard for the courts' clerical errors in child welfare cases.

SUPPLEMENTAL LETTERS UNDER MASS. R. APP. P. 16 (l)

Rule 16 (l) of the Mass. R. App. P. allows a party to file a letter with the clerk bringing to the court's attention "pertinent and significant authorities" after briefing is completed or after oral argument but before a decision. This Rule is an effective way to present to the court new case law, statutes or rules that pertain to your case, or older law that counsel missed the first time around. Counsel should not simply cite to the new authority in the letter; rather, counsel should point out to the court, "without argument," why the supplemental citation is necessary and the place in the brief or the point at argument to which the supplemental citation pertains. If the authority is from another jurisdiction, counsel should attach a copy of it to the letter. Other counsel may respond to the letter, but are also bound by the Rule's limitations.

The court takes seriously the prohibition in the Rule against making additional arguments in your letter. In Commonwealth v. Siano, the Appeals Court refused to consider what it deemed "additional arguments" made by way of a Rule 16(l) letter. 52 Mass. App. Ct. 912, 913 n. 1, *further app. review denied*, 435 Mass. 1108 (2001). Of course, counsel is free to provide supplemental argument when *invited* to do so by the panel. In such a case, counsel should remind the panel in the letter that the panel made such an invitation and the context in which the invitation was made.

USE OF RULE 1:28 DECISIONS

Several attorneys have asked us whether Rule 1:28 decisions can be cited in a brief. The case law suggests that Rule 1:28 decisions cannot be cited as precedent except, perhaps, under very limited circumstances. The reasoning for this rule is set forth in Horner v. Boston Edison Co.:

> The most important factor is that summary decisions, although open to public examination, are made only by the panel of justices who decide the case. If a decision is to be a summary disposition order, it is not circulated to the other members of this court and reflects only the views of that particular three-judge panel. If a decision is to be published in the official reports of the court, it is circulated to all other justices who are free to make any comments or suggestions concerning the draft decision. That remains a crucial distinction because a published opinion represents the view of the entire court.

45 Mass. App. Ct. 139, 141 (1998) (citation omitted); see also Lyons v. Labor Relations Com., 19 Mass. App. Ct. 562, 566 n. 7 (1985); Chhoeun Ny v. Metropolitan Prop. & Cas. Ins. Co., 52 Mass. App. Ct. 471, 475 n. 7 (2001).

The SJC and the Appeals Court have, however, apparently left open the possibility that certain unpublished decisions may at least be *considered* by an appellate court. See Commonwealth v. Huot, 380 Mass. 403, 409 n. 4 (1980) (faulting the defendant for not providing the court with a copy of an unpublished habeas corpus decision, suggesting that it would have considered it had it possessed a copy; "[m]ere citation of an unpublished opinion does not bring it to our attention."); Horner, 45 Mass. App. Ct. at 140-41 (stating that the SJC has "left open the possibility that a summary decision could be cited as precedent in a 'related' case," though noting that it has "had no occasion to do so"); Purvis v. Commissioner of Correction, 29 Mass. App. Ct. 190, 192 n. 5 (1990) (refusing to rely upon a Rule 1:28 decision cited by one of the parties "without assessing any similarities and differences between that case and the present one."); cf. Commonwealth v. Janosky, 2001 Mass. Super. LEXIS 375, *14 n. 7 (2001) (citing favorably a Rule 1:28 decision as having similar facts and reasoning to the instant case while, at the same time, noting that the unpublished decision could not be cited as precedent). Accordingly, an argument can be made under Horner and Purvis that a Rule 1:28 decision in a "related" case – perhaps an earlier care and protection appeal involving the same children, or an appeal involving the same parent(s) and different children should be considered by the Appeals Court. Although Huot and Janosky suggest that the court may consider an unrelated Rule 1:28 decision involving similar facts, the

(Use of Rule 1:28 Decisions - continued from page 4)
cases do not specifically acknowledge a willingness to do so. Appellate counsel is, of course, free to make a good faith argument that this rule should be changed in order to cite a favorable Rule 1:28 decision.

The CAFL staff is aware of several instances where DSS has cited to Rule 1:28 decisions at both the trial and appellate level. CAFL trial and appellate counsel should be prepared to cite the cases referenced above in opposing DSS' use of Rule 1:28 decisions.

RECENT CHILD WELFARE CASES

The child welfare cases published from the second half of 2001 through the first half of 2002 are as follows (most recent first):

Adoption of Roni, 56 Mass. App. Ct. 52 (2002)
The confrontation clause does not apply to civil cases. However, orders barring parents from the courtroom during testimony from children, or otherwise limiting parties' participation in hearings, should be "narrowly tailored to the particular protection required in the circumstance." Only where absolutely necessary should parents be excluded entirely from the courtroom. Such orders should be supported by an explicit finding that allowing the child to testify outside the presence of her parents will avoid traumatizing the child. Although such findings were absent here, they were implicit in the judge's order. Issues concerning the propriety of a seventy-two hour hearing are moot on an appeal of a final judgment; the proper avenue of relief is a petition under c. 211, § 3 at the time the party is aggrieved.

Adoption of Galvin, 55 Mass. App. Ct. 91 (2002) (rescript)
With respect to sibling visitation, the court must determine the nature and frequency of visits, both initially and in "periodic reviews." The court cannot leave the matter for DSS to determine. The Appeals Court affirmed the underlying care and protection and termination decrees, but remanded the case for a hearing on sibling visitation.

In the Matter of a Care and Protection Summons, 437 Mass. 224 (2002)
Judge's order that parents provide information about child's death or whereabouts did not violate their 5th Amendment rights. Judge could properly find parents in contempt for refusing to provide such information and draw an adverse inference from their silence.

Adoption of Lenore, 55 Mass. App. Ct. 275 (2002)
DSS must make reasonable efforts to reunify family, and those efforts were made here. Denial of post-adoption visits based on child's alleged embarrassment about parents' limitations was not supported.

Care and Protection of Georgette, 54 Mass. App. Ct. 778 (2002)
The Appeals Court affirmed the Juvenile Court's denial of children's counsel's motion for new trial. The children's appellate counsel alleged that their trial counsel provided ineffective assistance due to a conflict of interest between the children. According to the Appeals Court, appellate counsel failed to provide affidavits from the children showing what their position was at the time of trial (as opposed to their current position during the appeal), when and how they informed trial counsel what their positions were, and what they wanted trial counsel to do on their behalf at trial. The Court also noted that children's counsel failed to acknowledge that the appeal was from the denial of the new trial motion rather than from the underlying judgment. The SJC has taken the case on further appellate review.

Adoption of Peggy, 436 Mass. 690 (2002)
Trial court can terminate parental rights of foreign national regardless of immigration status. The International Convention on the Rights of Children is not binding because it has not been ratified.

Adoption of Irene, 54 Mass. App. Ct. 613 (2002)
Trial court abused its discretion in approving a plan allowing a grandmother to adopt, when the evidence showed that the child's best interests were served by being adopted by her foster parents. The trial court erroneously failed to consider 51A reports and 51B investigations about the grandmother. The court also erred in approving the grandmother without a homestudy as required by c. 119, § 26(2)(i).

Adoption of Fran, 54 Mass. App. Ct. 455 (2002)
Father's failure to protect unrelated child with whom he lived in a communal relationship bore adversely on his fitness to parent his own children, even if he was not caretaker of unrelated child. Even if father did not "abandon" his children as that term is statutorily defined, his abandonment "in fact" bore adversely on his parental fitness. GAL who was expert in cult behavior did not provide improper profile testimony; his descriptions of "destructive" groups was not used to prove that past acts occurred, but only to predict future harm. Although Court may have erred in telling father that it would give less credence to his testimony if he refused to testify under oath, any error here was harmless.

Care and Protection of Elaine, 54 Mass. App. Ct. 266 (2002)
The Appeals Court reversed a finding of father's unfitness. Although the trial court's subsidiary findings were supported by the record and not clearly erroneous, the findings, taken together, did not prove parental unfitness by clear and convincing evidence. The father's lack of housing was insufficient basis for a finding of unfitness. DSS also failed to provide father with sufficient services; DSS is not allowed to refuse a parent services just because the agency believes adoption is the appropriate goal.

Care and Protection of Quinn, 54 Mass. App. Ct. 117 (2002)
Trial court did not err in refusing to continue a care and protection trial until after the father's criminal trial for beating the children. Decision on whether to continue trial rests with trial

(Recent Child Welfare Cases - continued from page 5)
court's wide discretion. Fifth Amendment protections are limited in care and protection proceedings. While a parent may invoke the privilege against self-incrimination, the court could draw an adverse inference from father's failure to testify. Evidence of father's criminal record was relevant to current fitness; while stale information could not form basis of finding of present unfitness, prior history had prognostic value.

Adoption of Whitney, 53 Mass. App. Ct. 832 (2002)
Trial court erred in failing to give incarcerated father a meaningful opportunity to be heard. Trial judge must choose among available options "how best to assure that a parent has a meaningful opportunity to rebut the evidence presented at trial," including the parent's presence, video or telephone conferencing during trial, documentary submissions, deposition testimony, or "other reasonable means." Mere participation of counsel and submission of affidavits is not sufficient.

Adoption of Olivia, 53 Mass. App. Ct. 670 (2002)
While parents have right to appointed counsel in termination proceedings, they do not have right to counsel of their choice. A parent's motion for change of appointed counsel must show good cause. Here, father's motion did not show good cause and was properly denied, and father was given choice of proceeding with prior counsel or acting pro se. Father made a knowing, intelligent and voluntary waiver of his right to counsel when he elected to proceed pro se.

Adoption of Natasha, 53 Mass. App. Ct. 441 (2001)
DSS had conflict of interest and violated its own regulations in placing child in home of DSS supervisor in same area as social workers supervising case. Although an appropriate remedy might have been, and might in the future be, disqualification of the agency to prosecute the petition, that result was not necessary here in light of the clear and convincing evidence of mother's unfitness and her opportunity at trial to show bias by DSS social workers. Here, judge was aware of DSS conflict and able to give testimony from DSS workers appropriate weight.

Adoption of John, 53 Mass. App. Ct. 431 (2001)
Agreements for judgment in termination proceedings need not follow the same strict procedural requirements as for surrenders, including the contents of the judge's colloquy with a parent. Here, the colloquy was sufficient. There is no need for clear and convincing evidence of parental unfitness when parent consents to judgment, nor need the judge make a specific finding of unfitness. Trial court's order for post-adoption contact required remand, because order was not clear as to whether there was a "significant bond" between mother and child.

Adoption of Sherry, 435 Mass. 331 (2001)
The child's attorney waived any work product privilege in her non-testimonial expert's opinions by allowing the expert to share her thoughts with father's counsel and the court investigator. The court erred (though harmlessly) in allowing the foster mother to submit a written statement in addition to her oral testimony. Although c. 119, § 29D allows foster parents notice and an opportunity to be heard, the rules of evidence and principles of due process and fundamental fairness forbid the filing of written statements by witnesses.

Adoption of Hank, 52 Mass. App. Ct. 689 (2001)
The trial court's wholesale adoption of DSS' proposed findings "by reference" ran afoul of the purposes of Rule 52(a) of the Massachusetts Rules of Civil Procedure. Where the judge adopts a party's proposed findings verbatim, the findings are "subjected to stricter scrutiny by an appellate court." Here, the findings were supported by the evidence, and the fact that the judge rejected DSS' adoption plan shows that he carefully considered the evidence at trial.

Adoption of Don, 435 Mass. 158 (2001)
Parents do not have constitutional right to confrontation in care and protection or termination proceedings. Trial court did not err in requiring parents to sit in rear of courtroom and to remain still while children testified. Long delays in termination proceedings do not rise to the level of due process violations when parents cannot show that the delay was prejudicial to them. Here, despite the fact that the delay was "inordinate," the parents could not show that the outcome would have been different had the proceedings moved more quickly.

Adoption of Dora, 52 Mass. App. Ct. 472 (2001)
The trial court erred in approving both DSS' and the parents' competing plans and allowing DSS to choose. Section 3(c) of c. 210 requires that the court, not DSS, approve an adoption plan. The trial judge's obligation to "consider" a plan requires not just examination of the plan but "careful evaluation of the suitability" of the plan and meaningful evaluation of the plan. In cases of competing plans, "meaningful evaluation" requires the judge to assess both adoptive options and to approve of one or disapprove of both. This case also explicitly blesses "bifurcation" of proceedings into unfitness and best interests hearings, at least in certain circumstances. The Appeals Court noted that if the court lacks sufficient evidence to choose between competing plans, the proper course is for the court to address parental unfitness, suspend proceedings, and then, at a later hearing, take additional evidence on which plan serves the child's best interests.

Adoption of Donald, 52 Mass. App. Ct. 901 (2001) (rescript)
Parents whose rights have been terminated have no right to participate in permanency hearings. Entry of a decree dispensing with consent terminates the rights of the parent "to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named [in the petition]." A permanency hearing is a "legal proceeding affecting . . . disposition of the child." Pendency of an appeal of the termination decree does not stay or change this outcome.

ORAL ARGUMENT

There are several important developments in CAFL appellate practice with respect to oral argument.

1. Every Case Gets Oral Argument

At some point during the early summer 2002, the Appeals Court decided to give all CAFL appeals oral argument. Accordingly, do not judge the merits of your appeal based on getting oral argument; many cases will be still be decided pursuant to Rule 1:28. According to Justice Perretta, this decision was made in order to shorten the time between briefing and decision.

2. Change to Mass. R. App. P. 22(b)

On May 3, 2002, the Supreme Judicial Court amended Mass. R. App. P. 22(b) regarding oral argument in two ways. First, it shortened the time for arguing first degree murder appeals from thirty to twenty minutes. Second, and of more relevance to CAFL appellate attorneys, it *appears* to have made it easier to request additional time to argue. The prior version of the Rule provided that, if counsel believed additional time was necessary for the adequate presentation of argument, counsel "may request additional time, but such requests will rarely be granted." The amended Rule provides that "counsel may request additional time for good cause shown." Good cause may exist if your appeal has several important issues, or if there are multiple appellants each of whom wishes to argue.

3. Failure to File Brief in a Timely Manner

Appellees please note: if you do not file a brief or you file a brief late without permission, you cannot participate at oral argument except by leave of the court as set forth in Mass. R. App. P. 19(c). Although this is not a novel rule, it was recently re-iterated in Commonwealth v. Mazzone, 55 Mass. App. Ct. 345, 346 n. 1 (2002), in which the Appeals Court noted that the Commonwealth was not permitted to present oral argument due to the unexcused late submission of its brief. Appellants must be aware that the consequences of failure to file a brief are even more serious. Under the Appeals Court's "Standing Order Concerning Dismissal of Appeals and Reports in All Cases for Lack of Prosecution," your client's appeal may be dismissed if you do not file a brief or fail to file it on time. The Appeals Court sends us a copy of the letter it sends out warning appellant's counsel of the impending dismissal.

CPCS WEB PAGE IS IMPROVING

The CPCS web site may not be in the same league as the slick web sites of e-commerce companies, but we are continually trying to update and upgrade it. The CPCS home page, < www.state.ma.us/cpcs >, has always been a useful site for downloading forms and information. You undoubtedly know that you can access billing information and the Private Counsel Manual (including our performance standards) from the CPCS home page. The "Defender Links" on the CPCS home page gives you access to legal research databases, child abuse and sexual abuse information, medical and mental health journals, and many other sites of interest. From the CAFL page you can link to compilations of "General Law Web Sites," "Family Law Web Sites" and "Other Sites of Interest." The "Other Sites" link includes sites relevant to child welfare practice such as the National Association of Counsel for Children and the ABA Center on Children and the Law. We would like to add more information, including links and forms, that would be useful to CAFL appellate attorneys, and we could use your help. Please send suggestions for improving the CAFL site to Andy Cohen at < acohen@publiccounsel.net >.

NEW FILING FEES

Effective August 12, 2002, the fees for certain trial and appellate filings increased. Although most of your clients' filing fees will be waived (after filing a motion to waive filing fees and a satisfactory supporting affidavit of indigence), some clients who are indigent for purposes of receiving court-appointed counsel might nevertheless be required to pay the filing fee. Clients who are commonly ordered to pay filing fees include parents with incomes and incarcerated parents who have sufficient funds in their canteen accounts. The new fees are set forth below:

Action	New Fee	Old Fee
Entry of Appeal in Appeals Court or SJC	$250	$150
Entry of Appeal of Single Justice Denial of Relief under SJC Rule 2:21 to Full Panel	250	150
Entry of Single Justice Petition in Appeals Court (including motions for stay pending appeal) or SJC	260	160
Petition for Further Appellate Review	225	200
Application for Direct Appellate Review	0	0

FISCAL YEAR 2002 APPELLATE ASSIGNMENTS

During Fiscal Year 2002 (July 1, 2001 to June 30, 2002), the Children and Family Law Program issued approximately 186 new appellate assignments for approximately 87 newly-filed appeals. We also made 22 re-assignments for attorneys who have left the practice, had conflicts, or could not accept or continue with the appointment for one reason or another. Although these numbers are, once again, down slightly from the prior year, they do not necessarily suggest a trend of decreasing numbers of appeals each year. The number of assignments in the second half of Fiscal Year 2002 was considerably higher than in the first half of the year. The chart below compares assignments during the past three years:

Year	Appeals*	Total Assignments	Re-Assignments
FY 2002 (7/1/01-6/30/02)	87	186	22
FY 2001 (7/1/00-6/30/01)	90	195	16
FY 2000 (7/1/99-6/30/00)	95	205	20

*Appeals by multiples parties in a single care and protection/termination case are considered one appeal; an appeal from a care and protection adjudication and a later appeal from a termination decree or § 29B judgment are considered separate appeals, even if the same counsel are assigned.

CHANGE TO MASS. R. APP. P. 11

Effective September 3, 2002, Mass. R. App. P. 11(b) ("Contents of [DAR] Application; Form") has been amended to require (a) that the statement of the issues of law raised by the appeal also contain a "statement indicating whether the issues were raised and properly preserved in the lower court"; and (b) that the applicant "append a copy of any written decision, memorandum, findings, rulings, or report of the lower court relevant to the appeal." The full text of the amended Rule can be found at:
< www.lawlib.state.ma.us/mrap11.html >